DATE: May 27, 1999

CASE N0S.: 96-ERA-00043
98-ERA-00024

In the Matter of

MAGED F. GABALLA
Complainant

v.

CAROLINA POWER AND LIGHT COMPANY
Respondent

ORDER DENYING FORMER COUNSEL'S MOTION TO INTERVENE; DENYING FORMER COUNSEL'S MOTION TO STRIKE AND FOR LEAVE TO REPLY TO COMPLAINANT'S RESPONSE TO MOTION TO INTERVENE; VACATING THE APRIL 2, 1999 ORDER AND REINSTATING THE MARCH 23, 1999 DECISION AND ORDER RECOMMENDING APPROVAL OF THE SETTLEMENT AGREEMENT

On March 23, 1999, I issued a recommended decision and order approving a settlement agreement between the Complainant and the Respondent and dismissing with prejudice all complaints filed by the Complainant under the provisions of the Energy Reorganization Act of 1974 (the "Act"), 42 U.S.C. 5851, and the regulations promulgated thereunder as contained at 29 C.F.R. Part 24. Pursuant to 29 C.F.R. 24.7(d), my recommendation would have become the final order of the Secretary of Labor unless a petition for review was filed with the Administrative Review Board within ten days of March 23, 1999.

By letter dated April 1, 1999, the Respondent pointed out the recommended decision and order made no mention of a notice of lien for attorney's fees previously filed by the Attorney David K. Colapinto who had represented the Claimant in this matter until July 7, 1998 when Administrative Law Judge Robert D. Kaplan granted his motion to withdraw as the Complainant's counsel. Because neither the parties' settlement agreement nor their joint motion for approval of the settlement agreement contained any reference to Attorney Colapinto's lien for attorney's fees, I concluded that the record was unclear whether the parties considered this matter in reaching a settlement. Accordingly, I issued an order on April 2, 1999 vacating the recommended decision and order and allowing the parties ten days to address whether they

wished the settlement approved subject to Attorney Colapinto's lien for attorney's fees.[1] The parties responded to this order by asserting that the matter of Attorney Colapinto's alleged entitlement to attorney's fees had been fully considered in their negotiations leading up to settlement agreement. The parties also urged that I reinstate my recommendation for approval of the settlement agreement.

On April 12, 1999, I issued an Order to Show Cause why the April 2, 1999 order should not be vacated and my prior recommendation for approval of the parties' settlement agreement reinstated with a finding that Attorney Colapinto's asserted lien for attorney's fees is not actionable in this proceeding and must be addressed in another forum on a claim of *quantum meruit*. I noted in this order that my review of the record showed the Complainant had fully considered the impact of Attorney Colapinto's asserted lien when he entered into the settlement agreement. I further noted that Attorney Colapinto, as a non-party, had not been served with the documents relating to approval of the settlement agreement and his asserted lien for attorney fees. Accordingly, I directed that he be provided with copies of these documents and that he submit his response to the order to show cause by April 22, 1999.

On April 22, 1999, Attorney Colapinto submitted a response to order to show cause, and on April 26, 1999, he filed a motion to intervene. The Complainant's present counsel then filed a responsive brief on May 3, 1999. Contained in present counsel's brief are references to Attorney Colapinto's prior representation of the Complainant including information pertaining to prior Alternative Dispute Resolution ("ADR") mediation proceedings and the merits of fee disputes previously filed separately *in camera* on Attorney Colapinto's motion to withdraw. Thereafter, on May 18, 1999, Attorney Colapinto filed a motion to strike the Complainant's references to the ADR proceedings or, in the alternative, to disclose other information contained in the prior settlement agreement and for leave to reply to the Complainant's response to his motion to intervene.

Now that the parties and Attorney Colapinto have been afforded an opportunity to address all matters relevant to the parties' settlement agreement and Attorney Colapinto's asserted lien for attorney's fees, the matter is now ripe for ruling.

Motion to Intervene

Attorney Colapinto moves to intervene in the present proceeding to protect his interest in receiving attorney's fees for his prior representation of the Complainant. While a number of cases are cited in support of his motion, only one, *Pogue v. U.S. Department of the Navy*, 87-ERA-21 (Sec'y April 14, 1994) (Final D&O on Remand), arose under the Act.

In *Pogue*, the Secretary of Labor permitted intervention by a former attorney to preserve his rights to collect supplemental attorney's fees. The former attorney in *Pogue* had been

[1]Thereafter, on April 8, 1999, I issued an errata and amended the April 2, 1999 order.

previously awarded attorney's fees in March 1988 after fully litigating the case through trial and successfully securing the rights of his client. The former attorney ended his representation of the client during the appellate process, and, upon motion, wanted to supplement the original award of fees for partial appellate representation.

The facts of the present case are clearly distinguishable. First and most importantly, the present claim never reached litigation, and no administrative determination has been rendered on the merits of the Complainant's allegations under the Act. Rather, the Complainant and the Respondent arrived at a settlement before the case ever proceeded to hearing, and they now seek to have their agreement approved as a full, fair and complete settlement of Complainant's claims under the Act. Further, Attorney Colapinto voluntarily withdrew from this case before the parties came to any resolution, and he was not involved in the negotiation of the proposed settlement. Finally, at no time did Attorney Colapinto secure an award of statutory fees in this forum, whereas the former attorney in *Pogue* merely sought to supplement a prior award of fees.

These differences, particularly the fact that the instant case was not litigated to any administrative decision but rather was settled based on the parties' negotiations in which Attorney Colapinto did not participate, render the rationale of *Pogue* inapplicable herein. More on point is *Tinsley v. 179 South Street Venture*, 89-CAA-3 (Aug. 3, 1989) (order of remand), where the Secretary held that, in a case where parties negotiate a private resolution of a complaint brought under an environmental whistleblower protection statute and incorporate a provision for payment of attorney's fees in the settlement agreement, the administrative law judge does not have authority to approve the fee amount, only whether the net amount to be received by the complainant (*i.e.*, after deduction of the agreed-upon attorney's fees) is fair, adequate and reasonable. *Compare Macktal v. Brown & Root, Inc.*, 86-ERA-23 (ARB January 6, 1998) (attorney entitled to fees based on successful litigation before the Secretary to establish that terms of a settlement agreement were illegal). Thus, the reasoning in *Pogue* can not be applied in the present case.

Moreover, the other cases cited by Attorney Colapinto to buttress his attempt to intervene in this forum are also distinguishable. In *Ashley v. Atlantic Richfield Company*, 794 F.2d 128 (3rd Cir.1986), a sex discrimination case litigated under Title VII, the court held that a complainant's entry into a settlement agreement with her employer does not extinguish her right to seek payment of attorney's fees by the employer. *Kalywongsa v. Moffett*, 105 F.3d 283 (6th Cir. 1997) dealt with the importance of resolving fee disputes when an express written agreement for fees exists), and *Novinger v. E.I. Dupont de Nemours & Co.*, 809 F.2d 212 (3rd Cir.1987) held that a federal district court has proper jurisdiction to resolve dispute between plaintiffs and their former counsel over counsel's contractual entitlement to attorney's fees based on contingent fee agreement. While *Novinger* would at first glance appear to lend some support to Attorney Colapinto's intervention efforts, it must be noted that an administrative law judge's jurisdiction is not coextensive with that of a federal district judge. As discussed above, an administrative law judge lacks authority under the Act to adjudicate any attorney's entitlement to fees in the context of a privately settled case.

Accordingly, I find and conclude that I lack jurisdiction in the circumstances of the instant case to adjudicate the matter of Attorney Colapinto's alleged entitlement to attorney's fees. Consequently, his motion to intervene must be denied.

Approval of the Parties' Settlement Agreement

In response to my April 2, 1999 order, the Complainant has stated that he knowingly accepted the terms of the present settlement despite Attorney Colapinto's lien. It is inherent in the requirement that a settlement agreement be fair, adequate and reasonable that a complainant knowingly and voluntarily executed it. Federal courts have created a "totality of circumstances" test which involves the balancing of a number of factors in determining whether execution of a contract/agreement was knowing and voluntary. *Stroman v. West Coast Grocery Co.*, 884 F.2d 458 (9th Cir. 1989). To determine the atmosphere under which the agreement was executed, the court in *Stroman* identified the following elements to be considered: (1) the clarity and unambiguous language of the agreement; (2) the plaintiff's education and business experience; (3) the amount of time complainant had access to the agreement before signing it; (4) the role of complainant in negotiating the terms; (5) whether complainant consulted counsel; and (6) whether consideration was given in exchange for the release. *See also Bormann v. AT & T Communications, Inc.*, 875 F.2d 399 (2d Cir. 1989).

The language of the proposed settlement agreement and corresponding release are very clear and unambiguous. In his April 8, 1999 response to the April 2, 1999 Order to show cause, the Complainant states that, "[d]uring the course of settlement negotiations, Mr. Gaballa always contemplated that if Mr. Colapinto felt he were entitled to any additional compensation, that would be a matter to be determined after a full trial in another forum based on a claim in *quantum meruit*." Complainant's Response at 7. I also note that the Complainant is experienced in litigation under the Act; *see Gaballa v. Arizona Public Service Co. and The Atlantic Group*, 94-ERA-9 (Sec'y January 18, 1996) *(*prior case where the Complainant prevailed on a whistleblower complaint); that the record reflects that the Complainant participated in the settlement negotiations in which he was represented by counsel; and that substantial monetary consideration was given by the Respondent in exchange for the Complainant's release. Based on these factors, and incorporating by reference the findings in my March 23, 1999 recommended decision and order, and considering all of the pleadings, I am convinced that the Complainant entered into the settlement agreement with full understanding of the potential consequences of his actions. Accordingly, I reaffirm my prior finding that the parties' agreement constitutes a fair, adequate and reasonable settlement of the complaints.

Based on the foregoing discussion, I will deny Attorney Colapinto's motion to intervene for want of jurisdiction over the matter of his entitlement to fees, and I will deny as moot all other

motions filed thereafter by Attorney Colapinto.[2] I will also vacate the April 2, 1999 order and reinstate the March 23, 1999 recommended decision and order.

ORDER

Accordingly, **IT IS HEREBY ORDERED THAT**:

1. Former Counsel Colapinto's Motion to Intervene is **DENIED.**

2. Former Counsel Colapinto's May 18, 1999 Motion to Strike Disclosures of Settlement Information and for Leave to Reply to Complainant's Response to Motion to Intervene is **DENIED** as moot.

3. The Order of April 2, 1999, as amended by the Order of April 8, 1999, is **VACATED** and the attached March 23, 1999 RECOMMENDED DECISION AND ORDER APPROVING SETTLEMENT AGREEMENT AND GENERAL RELEASE AND DISMISSING COMPLAINTS WITH PREJUDICE is **REINSTATED** in its entirety

_____
Daniel F. Sutton
Administrative Law Judge

Camden, New Jersey
Attachment:

NOTICE: The attached Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a

[2] Pursuant to Judge Kaplan's July 7, 1998 order placing under seal the documents which had been submitted to him *in camera*, I did not review any evidence pertaining to Attorney Colapinto's withdrawal as the Complainant's counsel. I also did not consider any information concerning Attorney Colapinto's past representation, the parties prior unsuccessful settlement discussions or any other information referenced in Attorney Colapinto's May 18, 1999 motion to strike as such information is not germane to dispositive question of whether I have jurisdiction to entertain Attorney Colapinto's motion to intervene in this proceeding for the purpose of enforcing his lien for attorney's fees.

petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).